

*In the
Missouri Supreme Court*

STATE OF MISSOURI,

Respondent,

vs.

RONNIE GONZALES,

Appellant.

No. SC86129

**Appeal to the MISSOURI SUPREME COURT
From the Circuit Court of St. Louis City
Twenty-second Judicial Circuit,
The Honorable Dennis Schaumann, JUDGE**

Appellant's Substitute Reply Brief

Gary E. Brotherton, MOBar 38990
Attorney for Appellant

Legal Writes, LLC
1390 Boone Industrial Drive, Ste. 120
Columbia, Missouri 65201-3381
Phone: (573) 875-1571

Fax: (573) 875-1572
GEBrotherton@LegalWritesLLC.com

*INDEX*¹

Authorities	2
Jurisdiction	3
Facts	
Points / Argument	
I. Excluding Evidence of Mike’s Reputation for Aggressiveness	5 / 7
II. Submitting “Initial Aggressor” Without Evidentiary Support	6 / 11
Conclusion	14
Appendix	
<i>State v. Ronnie Gonzales</i> , No. 82455 (Mo.App., ED 5/18/2004 -	
transferred	A1-A11

¹ This Index contains hyperlinks to each section of *Appellant’s Substitute Reply Brief*.

Authorities

CASES:

<i>State v. Buckles</i> , 636 S.W.2d 914 (Mo.banc 1982)	5, 8
<i>State v. Gonzales</i> , No. ED82455 (Mo.App., E.D. 5/18/2004).....	9
<i>State v. Huff</i> , 296 S.W. 121, 122 (Mo.1927)	6, 13
<i>State v. Johns</i> , 34 S.W.3d 93 (Mo.banc 2000).....	5, 8

CONSTITUTIONAL PROVISIONS:

U.S. Const., Amend. V	5-7, 11
U.S. Const., Amend. VI	5-7, 11
U.S. Const., Amend. XIV	5-7, 11
Mo. Const., Art. I, §10.....	5-7, 11
Mo. Const., Art. I, §17.....	5-7, 11
Mo. Const., Art. I, §18(a)	5-7, 11
Mo. Const., Art. V, §10	5-7, 11

MAI's:

MAI-Cr3d 306.06.....	6, 8-10
----------------------	---------

Jurisdiction

Mr. Gonzales incorporates by reference the statement of Jurisdiction, which appeared at pages 6-7 of Appellant's Substitute Brief.

Facts

Mr. Gonzales maintains the statement of Facts which appears at pages 8-12 of Appellant's Substitute Brief.

Points Relied On

I. Improper Exclusion of Gossir's Reputation for Aggressiveness

The trial court abused its discretion in refusing to let Ronnie present evidence of Mike Gossir's general reputation for "turbulence and violence" *even after* the State elicited from Mrs. Hoppe that Mike "seemed to us a very gentle type of person" because such rulings violated Ronnie's rights to due process, a fair trial, and to present a defense. *See* U.S. Const., Amends. V, VI and XIV; Mo.Const., Art. I, §§ 10 and 18(a). Since Ronnie asserted self-defense, Mike's reputation for turbulence and violence was admissible on the question of who was the aggressor. Excluding testimony from Ronnie, Sherry Baker, Robert Ost and Wayne Melton that Mike had a reputation in the neighborhood for being turbulent, violent and aggressive, let the State portray Mike as a one dimensional "gentle giant" while preventing Ronnie from completing the picture with Mike's turbulence and violence.

State v. Buckles, 636 S.W.2d 914 (Mo.banc 1982);

State v. Johns, 34 S.W.3d 93 (Mo.banc 2000);

U.S. Const., Amends. V, VI and XIV;

Mo.Const., Art. I, §§10 and 18(a);

MAI-Cr3d 306.06;

II. Submitting “Initial Aggressor” Without Evidentiary Support

The trial court plainly erred in refusing Instruction No. A and, in its place, submitting Instruction No. 15 because those rulings deprived Ronnie of his rights to due process and a fair trial before a properly instructed jury. *See* U.S. Const., Amends. V, VI and XIV; Mo.Const., Art. I, §§ 10 and 18(a). Paragraph 2 of Instruction No. 15 submitted the question of “initial aggressor” as a limit on Ronnie’s right to self-defense. The State and the trial court relied upon the evidence that Ronnie asked Mike Gossir “where’s your [Halloween] mask” as being fighting words that made Ronnie the initial aggressor. The law, however, defines an initial aggressor as “one who *first attacks or threatens to attack* another.” Absolutely no evidence supports the notion that Ronnie did either; Instruction No. 15 is a “straw man.” It so misdirected the jury that it has caused manifest injustice.

State v. Huff, 296 S.W. 121, 122 (Mo.1927);

U.S. Const., Amends. V, VI and XIV;

Mo.Const., Art. I, §§ 10 and 18(a);

MAI-Cr3d 306.06.

Argument

I. Excluding Evidence of Mike's Reputation for Aggressiveness

The trial court abused its discretion in refusing to let Ronnie present evidence of Mike Gossir's general reputation for "turbulence and violence" *even after* the State elicited from Mrs. Hoppe that Mike "seemed to us a very gentle type of person" because such rulings violated Ronnie's rights to due process, a fair trial, and to present a defense. *See* U.S. Const., Amends. V, VI and XIV; Mo.Const., Art. I, §§ 10 and 18(a). Since Ronnie asserted self-defense, Mike's reputation for turbulence and violence was admissible on the question of who was the aggressor. Excluding testimony from Ronnie, Sherry Baker, Robert Ost and Wayne Melton that Mike had a reputation in the neighborhood for being turbulent, violent and aggressive, let the State portray Mike as a one dimensional "gentle giant" while preventing Ronnie from completing the picture with Mike's turbulence and violence.

The State would like to craft a more defensible battleground by all but reading MAI-Cr3d 306.06 and its accompanying Notes on Use off of the front line. Respondent's lone citation to this critical instruction is nothing but an aside:

- First, “[t]hus, as will be discussed below, the issue of whether the victim is the initial aggressor is applicable only when discussing the defendant’s state of mind and his reasonable fear.” (Resp.Br. 15)
- Second, “the issue in determining whether self-defense is justified is never whether the victim was the initial aggressor but rather turns on whether the defendant reasonably believed that the victim was the initial aggressor and therefore had reasonable fear of the victim.” (Resp.Br. 18)
- Third, “Indeed the jury is never even required, under any circumstances to find that the victim was the initial aggressor as part of any of the elements of self-defense.” See MAI-C[r3d] 306.06.” (Resp.Br. 18);

The whole basis of this Court’s granting transfer would seem to be the interplay among, *State v. Buckles*, 636 S.W.2d 914 (Mo.banc 1982); *State v. Johns*,³⁴ S.W.3d 93 (Mo.banc 2000); and the amendments to MAI-Cr3d 306.06 just two years after *Johns*. Respondents dodge this bullet because that interplay pierces respondent’s entire argument:

--	--

<p>The defendant <u>need not</u> know of the victim's reputation for violence.</p> <p><i>Buckles, supra; accord MAI-CR3d 306.06.</i></p>	<p>The defendant <u>must</u> know of the victim's reputation for violence. <i>Johns, supra.</i></p>
---	--

Respondent makes no effort to explain this conflict in the law or the confusion it causes lower courts. *See State v. Gonzales*, No. ED82455 (Mo.App., E.D. 5/18/2004) (asking for clarification from this Court). Instead, respondent tries to turn this case on its head, asserting for the first time that “the issue of whether the victim is the initial aggressor is independent from the defendant’s reasonable fear of the victim.” (Resp.Br. 9). This “hail Mary” pass misses the point. The State is only able to conjure up this argument by wholly ignoring Part C – Special Matters of the Notes on Use to MAI-Cr3d 306.06. It bears repeating that two years *after Johns, supra* this Court adopted:

PART C - SPECIAL MATTERS

[Insert any of the following numbered paragraphs that are supported by the evidence and requested in writing in proper form by either party. Omit brackets and numbers.]

[1] Evidence has been introduced (of the reputation of the defendant for being [*Insert trait or traits, such as "peaceful and law-abiding" or "violent and turbulent."*]) (and) (**of the reputation of [name of victim] for being [Insert trait or traits.].** You may consider this evidence in **determining who was the initial aggressor** in the encounter (and for no other purpose).

[2] Evidence has been introduced that [*name of victim*] had a reputation for being (violent) (violent and turbulent) ([*other trait or traits indicating aggressiveness*]), **and that the defendant was aware of that reputation. You may consider this evidence in determining whether the defendant reasonably believed he was in imminent danger** of harm from [*name of victim*].

MAI-Cr3d 306.06 (*italics* in original; **bold** added). Part C explicitly contemplates evidence of the victim's reputation being admitted under either of two scenarios:

1. where the defendant may be **unaware** of it – C[1]; and
2. where the defendant must be **aware** of it – C[2].

In other words, if the defendant is unaware of the victim's reputation for violence and turbulence, then that evidence must be admitted but limited to

helping the jury decide who was the initial aggressor. This is precisely the long-standing rule that *Buckles, supra*, reaffirmed.

Here, Ronnie sought to use Mike's reputation for violence and turbulence in order to show that **Mike** was the initial aggressor. Thus, whether Ronnie knows that reputation or not, the evidence of it must be admitted. *Buckles, supra; accord* MAI-Cr3d 306.06, Notes on Use 7. Respondents have done nothing to refute or even challenge the application of Part C -- Special Matters, Note on Use, MAI-Cr3d 306.06.

II. *Submitting “Initial Aggressor” Without Evidentiary Support*

The trial court plainly erred in refusing Instruction No. A and, in its place, submitting Instruction No. 15 because those rulings deprived Ronnie of his rights to due process and a fair trial before a properly instructed jury. *See* U.S. Const., Amends. V, VI and XIV; Mo.Const., Art. I, §§ 10 and 18(a). Paragraph 2 of Instruction No. 15 submitted the question of “initial aggressor” as a limit on Ronnie’s right to self-defense. The State and the trial court relied upon the evidence that Ronnie asked Mike Gossir “where’s your [Halloween] mask” as being fighting words that made Ronnie the initial aggressor. The law, however, defines an initial aggressor as “one who *first attacks or threatens to attack* another.” Absolutely no evidence supports the notion that Ronnie did either; Instruction No. 15 is a “straw man.” It so misdirected the jury that it has caused manifest injustice.

Trying to salvage the conviction it won with Instruction No. 15, however, the State is left to contort the evidence. It rearranges the facts to create the following chronology:

1. “[Ronnie] made a sarcastic comment to Gossir...”
2. “Gossir responded”what did you hear about talking about me”

3. “[Ronnie] and Gossir began having a heated conversation”
4. “[Ronnie], who had been sitting in a chair in the living room, walked towards the front door and Gossir”
5. “[Ronnie] and Gossir were face to face and continued to have a heated conversation and cursing at each other”
6. “[Ronnie] and Gossir then began pushing each other and continued to argue”

(Resp.Br. 14-15) (transcript citations omitted). This chronology rearranges the evidence. In truth, Gossir’s reply came *as* Ronnie approached the front door to leave and Ronnie approached the front door *before* the “heated conversation” began (Tr. 239, 265, 440).

Respondent seems to abandon the notion that Ronnie’s asking Mike Gossir “where’s your [Halloween] mask” constituted fighting words sufficient to render Ronnie the initial aggressor at that point (Resp.Br. 14-15). Respondent adheres to Mr. Hoppe’s testimony that this comment was simply “sarcastic” (Resp.Br. 14; *accord* Tr. 236-237). Instead, Respondent points to the newly aligned chronology, asserting, “[I]t was [Ronnie] who got off of his chair and walked across the room,

getting into Gossir's face where they continued to have heated words." (Resp.Br. 15). Such editing of the testimony cannot be condoned.

There is no evidence from which any reasonable juror could conclude that Ronnie was the initial aggressor. Respondent claims, "even though the Hoppes did not testify as to who shoved whom first, or who cussed at whom first, this evidence was, at the very least, contradictory as to who was the 'initial aggressor' (Resp.Br. 15-16). But it is not just that the Hoppes *did not* testify as to who started the fight, they *could not* determine who started the aggression (Tr. 216, 266). Of course, Ronnie tried to give the jury evidence that Mr. Hoppe told police that "Mike started it," but the State successfully got that evidence excluded (Tr. 239-241; *see also Point II* of Appellant's Opening Brief).

The contradictions relied upon by the State are not contradictions in the "evidence," but contradictions in the "suspicion." There was absolutely no that either Ronnie or Gossir was the "initial aggressor," just that they both exchanged words and shoves. Submitting the "initial aggressor" language simply forced Ronnie's jurors into the untenable position of having to "choose between suspicion." *See State v. Huff*, 296 S.W. 121, 122 (Mo.1927). As the State conceded, "If there is no evidence indicating the defendant was the initial

aggressor or provoked the incident, then the [initial aggressor paragraph] **will not** be used.” (Resp.Br. 14) (emphasis in Resp.Br.) (citation omitted). There is **no evidence** that Ronnie was the initial aggressor. While the State may be able to create that suspicion by rearranging facts, suspicions do not equate to evidence.

Instruction No. 15 made a fair verdict impossible. Thus, this Court should reverse Ronnie’s convictions and remand for a new trial.

Conclusion

For all the reasons discussed, Ronnie Gonzales, appellant, respectfully requests that this court reverse his convictions for second degree murder and armed criminal action and remand for a new and fair trial.

Respectfully Submitted,

Gary E. Brotherton, MOBar #38990
Attorney for Appellant

Legal Writes, LLC
1390 Boone Industrial Drive, Ste. 120
Columbia, Missouri 65201-3381
Phone: (573) 875-1571
Fax: (573) 875-1572
GEBrotherton@LegalWritesLLC.com

Certificate of Compliance and Service

I, Gary E. Brotherton, hereby certify as follows:

- ✓ The attached brief complies with the limitations contained in Rule 84.06. The brief was completed using Microsoft Word, OfficeXP, in Book Antiqua, size 13-point font, or greater. According to MS Word, excluding the cover page, the signature block, this certificate of compliance and service, and the appendix, this brief contains _____ words, which does not exceed the **7,750** words allowed for an appellant's supplemental brief in this Court.
- ✓ The floppy disk filed with this brief contains a copy of this brief and appendix. It McAfee Antivirus, which is updated continually. According to that program, the disks are virus-free.
- ✓ A true and correct copy of the attached brief, floppy disk – containing a copy thereof and CD – containing a copy of the brief, appendix, exhibits referenced and authorities were hand-delivered this 6thth day of **December 2004**, to the Office of the Attorney General, Supreme Court Building, Jefferson City, Missouri 65102.

Gary E. Brotherton

Appendix

